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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 902

PAUL GINSBURG, Petitioner

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Respondent.

PETITIONER'S REPLY BRIEF

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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The respondent's brief in opposition fails to comply (and could not) with paragraph 1 of Rule 24 because it does not disclose "any matter or ground why the cause should not be reviewed by this Court".

The three **Questions Presented** (p. 1) on behalf of the respondent fail to present a single question that is properly before this Honorable Court.

The **"Statutes and Rules of Federal Civil Procedure Involved"** (p. 2) upon which the respondent relies, are not at all involved herein and have no applicability whatever to the Questions Presented (Petition, p. 2).

The respondent's **Statement of the Case** (pp. 2-5) is a gross misrepresentation of the case. It simply contains one paragraph (p. 4) which is outstanding for its pertinence: "In reliance upon the interpleader injunction prohibiting petitioner's prosecution of this action, **respondent did not answer or otherwise proceed in the action herein, except for filing the affidavits referred to above**" (emphasis supplied).

The respondent's frank admission that in the District Court it did not answer or otherwise proceed in the action except for filing affidavits, points to the crux of the case below. This is an admission of respondent's incurable default, which in turn poses the real question below: Did not the respondent thus waive its right, if any, to plead the "injunction"; and was not District Judge Bicks powerless, under the law, to give that affirmative defense to the respondent?

Assuming *arguendo* that your petitioner *was* enjoined in Pennsylvania and *is* enjoined in Arizona, it is a matter of record herein that he never was and *now* cannot be enjoined in New York.

Respondent's argument **I** (pp. 5-6) erroneously presupposes petitioner's "express disability of an injunction order" which, even if true, is not in issue here, because regardless of the alleged injunction's existence, validity or enforceability, the plain admitted point is that respondent did not plead or otherwise defend the action under the Federal Rules of Civil Procedure, pursuant to which Rules summary judgment must be entered as a matter of law for petitioner against respondent.

Respondent's argument **II** (pp. 7-8) is another immaterial one, with no place in this review. Just as respondent's first argument reinforced petitioner's point that the interpleader was illegal for lack of adverse claims against the respondent; its second argument supports petitioner's point that the transfer of the cause under 1404(a) from Pennsylvania to Arizona was illegal for inapplicability of 1404(a) to *in rem* proceedings.

Respondent's argument **III** (pp. 9-12) manifests the workings of respondent's defense mechanism. It

shows "Firstly", the respondent does not know the difference between right and wrong; "Secondly", it does not know the Rules; "Thirdly", it does not know one defense from another; "Fourthly", it thinks and hopes "a Federal Court has broad powers under the Federal Rules", but does not know how legally powerless a Court can be under the Rules applicable herein, without the right of waiver. Respondent's citations do not support its propositions, and its propositions do not support denial of certiorari herein.

Does not the straining and stretching of respondent's arguing merely reveal how hard it is trying to convince itself that it is not a crooked, contract breaker that, like a clever slicker, will treat "suckers" politely and gentlemanly while the payment of premiums continues, after which it will capriciously and whimsically entertain a reckless disregard for its contractual obligations and petitioner's contractual rights.

The respondent by now must be coming to a realization that one should never start something without considering what the end might be.

More than six years have passed since your petitioner surrendered his contracts to respondent for payment, and he has not yet been paid in money, but only in abuse at great expense. Those scraps of paper which were signed and sealed by The Mutual Life Insurance Company of New York provided that your petitioner was not only the sole beneficiary but also the absolute owner thereof and premium payer. How then, under such circumstances, could the respondent legally justify any of its misconduct since April 7, 1953? How then could the

respondent justify anything but prompt payment to petitioner?

No wonder the respondent ignores the Federal Rules of Civil Procedure and does not consider itself bound by them. It similarly ignores its contracts and does not consider itself bound by them. No wonder then that it is all mixed up in its brief on who is wrong, not knowing the difference between right and wrong.

Respondent's **Conclusion** is that it merely has been illegally resisting petitioner's repeated attempts to compel it to honor its contracts with him "rather than seeking special relief in the interpleader action, now pending in the Arizona District Court". This representation to the Court, is nothing but a ruse. It would not dare appear as a party in the interpleader action, for fear of permitting petitioner the forum for redress of his grievances against it. However, the respondent's Phoenix Counsel has always been present at proceedings in Arizona and keeps a close watch on them, the better to influence the proceedings adversely to petitioner. As a matter of fact, more than six years ago when respondent encouraged the "adverse" claimant to bring suit in Phoenix based upon an obviously unprovable, trumped up oral trust, petitioner advised respondent to present a valid Motion to Dismiss it, in line with its contractual duty to him. Upon refusal, your petitioner offered to pay respondent's counsel fees and received another refusal. The action would readily have been dismissed as to respondent just as it has been dismissed as to your petitioner. But this respondent does not seem to know any more about good faith than it does about good law. Nevertheless, since the respondent now claims

that it can get "special relief" in Arizona, should not this Honorable Court enter an adjudication which would leave it to seek special relief in that forum, by reversing the extra special relief already donated to it by District Judge Bicks with the approval of Circuit Judge Medina?

Conspicuous by absence from respondent's brief is any denial whatever that Circuit Judge Medina's son, Harold R. Medina, Jr., Esquire, and his law firm (Cravath, Swaine & Moore) work for the respondent, The Mutual Life Insurance Company of New York; or that retired Circuit Judge Harold R. Medina was specially ready, able and available to approve District Judge Alexander Bicks' illegal donation to respondent.

ADDENDA

On May 18, 1959 (just three weeks ago), the opinions of this Honorable Court were entered at No. 58 October Term, 1958, in the case of *Dick, Petitioner, v. New York Life Insurance Co.*, which opinions chart the certiorari course. Mr. Chief Justice Warren delivered the opinion of the Court, and Mr. Justice Frankfurter the dissenting opinion. For purposes herein, it does not matter which opinion is the correct one in that case, because both opinions support petitioner's right to certiorari in this case.

The authorities cited in Mr. Justice Frankfurter's dissent, the Evarts Act and the "Judges' Bill", will be cited in support of certiorari herein. *In the first place,* the importance of this case to the litigants is incidental and subordinate to the importance to the public, because there is involved the right to due process of law, de-

prived through a judgment that conflicts with the law of the instant and other Circuits, as well as the law of this Honorable Court. Therefore, pursuant to the Evarts Act, certiorari should be granted herein through sound judicial discretion "to secure uniformity of decision". It is respectfully submitted that when the certiorari power should be exercised to secure uniformity of decision, as in the instant case, it should not be denied because the case is incidentally important to the litigants. *In the second place,* the "Judges' Bill" supports certiorari herein because after Mr. Chief Justice Taft testified that no litigant is entitled to more than two chances, he went on to say the Supreme Court's function "is to preserve uniformity of decision among the intermediate courts of appeal". What better opportunity could be afforded this Court than the one in this case to preserve uniformity of decision, by deciding that the Fededal Rules of Civil Procedure must be followed by all litigants alike, just as they are for the protection of all litigants alike?

Incidentally, the Petition has already dealt with the two "chances" this petitioner has had, concluding that his first "chance" was before a tyrannical District Court and his second "chance" was before a prejudiced Circuit Court, with the obvious result that this Honorable Court is not a Court of last resort to him, but a Court of first chance.

This Honorable Court is invited to make a simple test of the reliability of the Court of Appeals by comparing its Opinion (App. 1) with the Record, to see if the case and its issues can be recognized therefrom; then to compare its judgment (App. 1) with the issues, to see if there has ever been an adjudication of a single issue

properly before the Court. (It will be noted that the entire opinion and judgment, including caption, names of Judges and Counsel, *et cetera,* were easily printed on one page with room to spare). Such an examination is the most effective way in which this Court can ascertain that your petitioner never had a chance.

CONCLUSION

The files of this Honorable Court are loaded with petitions for certiorari directed to all Ten Circuits in which Circuit Judges have deliberately, whimsically, capriciously denied litigants their right to a second chance. The cases which your petitioner alone has brought into this Court from the instant and other Circuits, particularly the Third and Seventh, establish this. Therefore, this Court's supervisory power must have been intended as a substitute second chance. However, the Court's reluctance to exercise its supervisory power, and the great odds against granting certiorari have made Circuit Judges, so inclined, quite confident that they can repeatedly dispense "justice" as they please, denying litigants a real second chance, *without fear of review.* In order to restrict, if not eliminate this disregard of the honor of the fair administration of justice in the Federal system, the petition for writ of certiorari should be granted in this case.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioner.